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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35842

NEW ENGLAND CENTRAL RAILROAD, INC.—TRACKAGE RIGHTS ORDER—
PAN AM SOUTHERN LLC

Digest:[1] This decision denies the petition of New England Central Railroad, Inc. (NECR) to reconsider a Board decision served on October 31, 2017, which adopted modifications to a trackage rights order governing the operations of Pan Am Southern LLC over an NECR railroad line. This decision also denies as moot a motion to strike.

Decided: April 24, 2018

By decision served on October 31, 2017 (Decision), the Board established new terms and conditions for the trackage rights of Pan Am Southern LLC (PAS) over a New England Central Railroad, Inc. (NECR) railroad line, extending approximately 72.8 miles from White River Junction, Vt., to East Northfield, Mass. (the Line). NECR now seeks reconsideration of the Decision.

BACKGROUND

Detailed background regarding the Line and the trackage rights order (TO), as well as the procedural history of this case, can be found in the Decision, slip op. at 1-4. Aspects of the prior proceedings relevant to the current petition for reconsideration are summarized below.

The terms and conditions of the original TO were set by the Board's predecessor, the Interstate Commerce Commission (ICC), in 1990. Nat'l R.R. Passenger Corp.—Conveyance of Bos. & Me. Corp. Interests in Conn. River Line in Vt. & N.H., 6 I.C.C.2d 539 (1990). Under a process set forth in the TO, those terms and conditions could be modified starting in 2010. In a petition filed June 17, 2014, NECR sought an order from the Board resetting the terms and conditions of the TO. (NECR Opening 5-6.) NECR sought two forms of relief: (1) a revised trackage rights fee; and (2) modifications to numerous other terms of the TO. NECR filed its opening statement and evidence on June 4, 2015.

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

NECR argued that the revised trackage rights fee should be determined under the SSW Compensation framework used by the Board and the ICC in prior trackage rights compensation cases.[2] A key point of contention between the parties centered on the appropriate methodology for calculating the interest rental component of SSW Compensation.[3] On July 16, 2015, NECR filed a motion (Methodology Motion) requesting that the Board adopt a new valuation methodology for determining the interest rental component called value in place (VIP), which NECR claimed was a variant of reproduction cost new less depreciation (RCNLD). NECR's Methodology Motion also specifically requested that the Board find the capitalized earnings (CE) approach discussed in SSW Compensation as a possible interest rental methodology was inappropriate for use in this case, and prohibit PAS from seeking discovery related to it.[4]

The Board denied NECR's Methodology Motion by decision served on February 12, 2016, holding that PAS should have an opportunity to build a record through discovery and obtain the data it needed to make its case on the appropriate valuation method for use in determining trackage rights compensation. PAS filed its reply statement and evidence on the merits on July 19, 2016. In its reply, PAS argued that the fee set forth in the original TO should be frozen in perpetuity, but if not, then the Board should use the CE method for calculating the interest rental component. Following discovery, NECR filed its rebuttal on January 23, 2017, and PAS filed its surrebuttal on February 22, 2017.

The Decision, served on October 31, 2017, rejected PAS's argument that the original TO fee should be kept in place permanently and employed SSW Compensation to calculate the

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[2] St. Louis Southwestern Railway—Trackage Rights Over Missouri Pacific Railroad—Kansas City to St. Louis (SSW I), 1 I.C.C.2d 776 (1984) and St. Louis Southwestern Railway—Trackage Rights Over Missouri Pacific Railroad—Kansas City to St. Louis (SSW II), 4 I.C.C.2d 668 (1987) (collectively, SSW Compensation). See, e.g., CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc., 3 S.T.B. 955 (1998) (applying SSW Compensation in a trackage rights compensation case). Under SSW Compensation, total compensation is the sum of three elements: (a) the variable cost incurred by the owning carrier due to the tenant carrier's operations over the owning carrier's track; (b) the tenant carrier's usage-proportionate share of the track's maintenance and operation expenses; and (c) an interest rental component designed to compensate the owning carrier for the tenant carrier's use of its capital dedicated to the track. E.g., SSW I, 1 I.C.C.2d at 779-80.

[3] In trackage rights compensation cases, the Board has generally discussed four possible methods for determining the appropriate valuation base for the interest rental component: (1) capitalized earnings; (2) comparable line segments; (3) reproduction cost new less depreciation; and (4) stand-alone cost. See Toledo, Peoria & W. Ry.—Trackage Rights Compensation—Peoria & Pekin Union Ry., FD 26476 (Sub-No. 1), slip op. at 4 (ICC served Sept. 20, 1994); Atchison, Topeka & Santa Fe Ry.—Operating Agreement—S. Pac. Transp., 8 I.C.C.2d 297, 304-305 (1992).

[4] In subsequent pleadings disputing the scope of discovery, NECR argued that the comparable line segment method would also be inappropriate. (See NECR Mot. for Suppl. Protective Order, Aug. 24, 2015.)

trackage rights fee. Decision, slip op. at 4-9. With respect to the interest rental component issue, the Board rejected NECR's VIP methodology, because it "produces mismatched results that do not provide a coherent picture of the line's value." Id. at 13. The Board stated that VIP is "neither RCNLD—a previously accepted valuation method—nor an approximation of RCNLD." Id. (footnote omitted). Given the demonstrated flaws of the VIP methodology, the Board instead used the CE methodology advocated by PAS. Id. at 14-19. In addition, with respect to other proposed changes to the terms and conditions of the original TO, the Decision found in most instances that the burden of proof had not been met and ultimately established terms and conditions consistent with the original TO.

On December 6, 2017,[5] NECR filed a petition for reconsideration asserting that the Board had committed material error by using the wrong methodology to calculate the trackage rights fee and by setting the trackage rights fee too low. (NECR Pet. for Recons. 1.)[6] NECR also requested that the Board reconsider several other provisions of the TO. Included with its petition are two verified statements, one from a new expert witness and the other from a vice president of NECR's parent corporation.

On December 11, 2017, PAS filed a motion to strike portions of NECR's reconsideration petition. PAS argues that NECR is seeking "to present two new arguments and a new methodology . . . under the guise of presenting merely a legal analysis of the evidentiary record." (PAS Motion to Strike 1.) Because "[a]ny and all of this evidence and analysis could and should have been presented" at an earlier stage of the case, PAS contends that the two verified statements and any arguments based on them should be stricken. (Id. 1-2.) PAS simultaneously filed a motion to hold PAS's reply deadline in abeyance until the Board rules on the motion to strike. PAS expresses concern that, should the Board deny PAS's motion to strike, PAS would need to hire experts and address NECR's improper new arguments on the merits. (See PAS Abeyance Motion 2.) By decision served on December 14, 2017, the Board postponed the deadline for PAS's reply to the petition for reconsideration until further order of the Board.

For the reasons discussed below, NECR's petition for reconsideration will be denied, and PAS's motion to strike will be denied as moot.

PRELIMINARY MATTERS

NECR argues that the Board should rule on PAS's motion to strike as part of the merits decision, rather than issuing a separate decision. (NECR Reply, Dec. 13, 2017; NECR Reply to

[5] NECR requested an extension of time, which was granted by decision served on November 16, 2017.

[6] All citations to NECR's Petition for Reconsideration refer to the errata version submitted by NECR on December 29, 2017. On the same day that NECR filed its errata, NECR filed a petition for review of the Decision with the U.S. Court of Appeals for the District of Columbia Circuit. That petition was dismissed for want of jurisdiction because the pending petition for reconsideration rendered the Decision non-final as to NECR. See New England Cent. R.R. v. STB, No. 17-1279 (D.C. Cir. Apr. 3, 2018) (per curiam).

Motion to Strike 3, 20.) The Board will accept NECR's proposal and rule on the motion to strike as part of this decision, which addresses NECR's reconsideration petition. Because almost all of NECR's reconsideration arguments are procedurally improper, and the Board is rejecting NECR's arguments on that basis, the Board will not require PAS to submit a response beyond its motion to strike. As discussed below, the Board is denying the motion to strike as moot.

DISCUSSION AND CONCLUSIONS

A party may seek reconsideration of a Board decision by submitting a timely petition that (1) presents new evidence or substantially changed circumstances that would materially affect the case, or (2) demonstrates material error in the prior decision. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3. The Board generally does not consider new issues raised for the first time on reconsideration where those issues could have and should have been presented in the earlier stages of the proceeding. Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry., 7 S.T.B. 803, 804 (2004). Here, NECR states that it "seeks reconsideration only on the ground of material error." (NECR Reply to Motion to Strike 1.) In a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error. See Can. Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009) (denying petition for reconsideration where the petitioner did not substantiate the claim of material error). Moreover, the error must be one that "would mandate a different result." See Montezuma Grain Co. v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); Or. Int'l Port of Coos Bay—Feeder Line Application—Coos Bay Line of Cent. Or. & Pac. R.R., FD 35160, slip op. at 2 (STB served Mar. 12, 2009).

The threshold question in addressing NECR's petition is how to treat the bulk of NECR's reconsideration argument and evidence regarding its material error claims, almost all of which was raised or submitted for the first time on reconsideration. As described below, the Board concludes that nearly all of the argument and evidence submitted by NECR on reconsideration could and should have been presented at an earlier stage in the proceeding and, therefore, that NECR may not rely upon them now. The few remaining arguments that were properly raised do not demonstrate that the Board committed material error. Accordingly, NECR's petition for reconsideration will be denied.

I. Waiver of Improper Reconsideration Materials

The Board generally does not consider arguments or evidence presented for the first time on reconsideration where those arguments or evidence could have and should have been presented in the earlier stages of the proceeding.[7] Because reconsideration is not the appropriate

[7] E.g., Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry., 7 S.T.B. 803, 804 (2004); Simplified Standards for Rail Rate Cases, EP 646 (Sub-No. 1), slip op. at 12-13 (STB served Mar. 19, 2008); Reasonableness of BNSF Ry. Coal Dust Mitigation Tariff Provisions, FD 35557, slip op. at 6 (STB served May 15, 2015); Pet. of the W. Coal Traffic League to Institute a Rulemaking Proceeding to Abolish the Use of the Multi-Stage Discounted Cost of

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time to present such materials under the Board's practice, such arguments or evidence are procedurally forfeited. E.g., Pet. of the W. Coal Traffic League to Institute a Rulemaking Proceeding to Abolish the Use of the Multi-Stage Discounted Cost of Capital in Determining the Indus. Cost of Equity Capital (Cost of Capital II), EP 664 (Sub-No. 2), slip op. at 2 (STB served Aug. 14, 2017) ("This argument is waived, because [petitioner] could have introduced it earlier but failed to do so" until the reconsideration phase of the proceeding).

NECR argues that this precedent applies only when petitioners seek reconsideration on the grounds of new evidence, whereas here, it is arguing material error. (See NECR Reply to Motion to Strike 11-12.) But the cases establishing that the Board will not consider arguments or evidence that should have been submitted at an earlier stage are not so limited; they apply to any materials that could and should have been presented prior to reconsideration, regardless of whether the petitioner alleges new evidence, changed circumstances, or material error.[8] The only case specifically cited by NECR as supporting its narrow construction, Simplified Standards, in fact establishes the opposite. (See NECR Reply to Motion to Strike 11 n.16.) The language quoted by NECR states, in addressing claims of material error, "new arguments that could have been presented earlier cannot be raised for the first time on reconsideration." Simplified Standards, EP 646 (Sub-No. 1), slip op. at 12-13 (emphasis added). Nothing in Simplified Standards limits this principle only to reconsideration petitions based on a claim of new evidence.[9]

NECR also attempts to draw a distinction between providing evidence for the first time on reconsideration that is intended to "add to" or "supplement" the existing record, which it acknowledges would be impermissible, versus providing evidence intended to "illuminate" or "elucidate" the record, which it claims is allowed. (See NECR Reply to Motion to Strike 9, 14, 16-19.) NECR asserts, for example, that it does not "suggest that the Board supplement the record and rely on [the Carey verified statement] as the record of decision." Instead, the "testimony supporting the Petition" is merely supposed to help the Board "recognize that it made

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Capital in Determining the Indus. Cost of Equity Capital (Cost of Capital I), EP 664 (Sub-No. 2), slip op. at 2, 6-7 (STB served Apr. 28, 2017).

[8] See, e.g., Coal Dust, FD 35557, slip op. at 2, 6 ("Because [petitioner] does not present new evidence or claim that there are changed circumstances, we consider [petitioner]'s arguments as claims of material error . . . . A party may not use a petition for reconsideration to provide, for the first time, explanation and support for claims it previously made and that the Board addressed in the prior decision."); Cost of Capital I, slip op. at 2, 6-7; Cost of Capital II, slip op. at 2.

[9] Citing 49 C.F.R. § 1115.3(c), NECR also argues that, "[i]n establishing material error, the petitioner may introduce evidence; but 'the evidence must be stated briefly and must not appear to be cumulative, and an explanation must be given why it was not previously adduced.'" (NECR Reply to Motion to Strike 12-13). Even if NECR's interpretation of this regulation were correct, NECR has not met the criteria. As discussed below, NECR has not provided an adequate explanation for why this evidence, which it seeks to introduce for the first time on reconsideration, was not previously adduced.

the wrong decision based on the record as it stood on October 30, 2017." (NECR Reply to Motion to Strike 16-17.)[10] The Board finds that NECR's claims of a distinction between evidence that "supplements" and evidence that "illuminates" are implausible and impractical. Because one could argue that virtually any newly submitted material is intended to illuminate the existing record, a party could effectively escape all restrictions on submission of new argument and analysis under NECR's approach simply by invoking material error. Moreover, whatever label it puts on its argument, NECR clearly wants the Board to consider this material, and indeed to use it as a basis for reconsidering the prior ruling. But NECR does not explain where it seeks to submit these materials if it is not attempting to submit them into the record, nor does it explain how it would be appropriate for the Board to rely on these materials if they are not part of the administrative record before the agency. Cf. 49 C.F.R. § 1114.6 (allowing official notice of certain materials under limited circumstances that do not apply here).

Regardless of whether NECR's reconsideration material is characterized as "new evidence" or as arguments and "elucidatory evidence," Board precedent prohibits parties from introducing such material for the first time on reconsideration when they could and should have submitted it earlier. See, e.g., Simplified Standards, EP 646 (Sub-No. 1), slip op. at 12-13. The reason for this practice is both simple and imperative. If the Board allowed a party to litigate a case to completion using one set of arguments and then submit an entirely different case on reconsideration, it would waste the resources of the parties and the Board in litigating and ruling on the party's initial positions. As the Board has stated,

> Nothing in the statute or the Board's regulations obliges the agency to rethink its decisions whenever a party wishes to try out a new theory or finds new information at a late stage in the process . . . . And if a party were free to reshape its case, so long as it did so within 20 days after a decision, the administrative process might never end.

Tex. Mun. Power Agency, 7 S.T.B. at 804 (emphasis added).

This inefficiency is a particular concern in large, complex proceedings such as this one. The parties compiled a voluminous record addressing a series of economic determinations, as well as a long list of other disputed terms and conditions. NECR seeks to discard that record and start fresh at this point, after the Board resolved many (but not all) of the litigated issues in favor of PAS. NECR's request runs contrary to the Board's practice—which the Board established to address situations just like this one—of not accepting reconsideration arguments and evidence that could and should have been presented earlier. Therefore, the vast majority of NECR's

[10] Confusingly, NECR simultaneously makes the contradictory assertion that "[e]xplanations are part of the record of Decision, and for that reason, whether explanatory testimony supporting NECR's Petition is new or old is not pertinent." (NECR Reply to Motion to Strike 16.)

evidence and arguments on reconsideration are waived (with three exceptions addressed below).[11]

II. NECR Arguments That Are Waived

A. NECR's Interest Rental Methodology Proposal

As detailed in the Decision, slip op. at 12-14, prior to reconsideration NECR advocated its VIP methodology as the only valid approach to determining the interest rental component of SSW Compensation. In its reconsideration petition, NECR adopts a completely new position, arguing that if the Board was unwilling to accept VIP, the Board should instead have developed a true RCNLD approach and either performed its own calculations based on evidence in the record or prolonged the proceeding even further by directing the parties to submit new rounds of evidence. NECR includes a new proposed RCNLD calculation in its reconsideration evidence. (See, e.g., NECR Pet. for Recons. 3-5, 8, 10-11 & V.S. Carey 14-18.)

NECR may not raise these arguments for the first time on reconsideration. Methodological issues were litigated exhaustively while the record underlying the Decision was being developed, and NECR could have submitted this proposal on multiple occasions during the merits phase of the proceeding. For example, NECR could have submitted a presentation using RCNLD in its opening evidence, but instead NECR proposed VIP. (See, e.g., NECR Opening, V.S. Banks & Ireland 6-8; see also NECR Rebuttal 27 (explaining NECR's decision to use VIP rather than RCNLD).) NECR continues to insist, incorrectly, that "VIP is a variation of RCNLD." (NECR Reply to Motion to Strike 9-10.)[12] Even if it were correct, had NECR submitted one particular RCNLD analysis earlier in the proceeding, that would not have created a right for NECR to argue for a new and different RCNLD analysis on reconsideration. Valuation issues were squarely at issue as the record was developed, and NECR was required to make its case then, not on reconsideration. Thus, reconsideration is too late a stage for NECR to change course and propose RCNLD instead of VIP. See Simplified Standards, EP 646 (Sub-No. 1), slip op. at 12-13; Tex. Mun. Power Agency, 7 S.T.B. at 804 ("Nothing in the statute or the Board's regulations obliges the agency to rethink its decisions whenever a party wishes to try out a new theory" on reconsideration).

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[11] As noted, PAS filed a motion to strike a portion of NECR's reconsideration evidence based on similar grounds. Although the concept is analogous, the Board does not need to grant the motion to strike a portion of the material, because almost all of the evidence and arguments are waived for the reasons discussed above. Accordingly, the Board will deny PAS's motion to strike as moot.

[12] As PAS explained during the merits phase, and the Board agreed, VIP contains structural flaws and therefore fails to approximate a valuation under RCNLD. See PAS Reply 19-20 & V.S. Baranowski 18, July 19, 2016; Decision, slip op. at 13. The Decision rejected VIP because it "inappropriately conflates RCNLD (applied to fixed in-place infrastructure assets) and [net liquidation value] (applied to 'marketable' rail assets) . . . produc[ing] mismatched results that do not provide a coherent picture of the line's value." Decision, slip op. at 13.

NECR's attempt to change course here is particularly egregious because, during the merits phase, NECR took the position that RCNLD cannot be applied in this case because the required "factors" are not available. (NECR Rebuttal 27 ("as a Class III carrier, NECR's accounts are not required to conform to the Uniform System of Accounts, and use of RCNLD is therefore not appropriate") (emphasis added).) It is procedurally improper for NECR to argue during the merits phase that RCNLD cannot be applied, and then contradict that position on reconsideration by arguing that it was material error for the Board not to apply RCNLD. See, e.g., M&G Polymers USA, LLC v. CSX Transp., Inc., NOR 42123, slip op. at 10 (STB served Sept. 27, 2012) (it was inappropriate for a party to make an argument "in direct conflict" with its prior argument); Conn. Trust for Historic Pres. v. ICC, 841 F.2d 479, 484 (2d Cir. 1988) (rejecting an argument because it was contrary to the party's argument earlier in the process). NECR attempts to distinguish Connecticut Trust as relating solely to "new evidence" (NECR Reply to Motion to Strike 11), but the decision itself contains no such limitation. Rather, it considers a situation like this one, where "an affected party changes its mind at a late stage in the process." Conn. Trust for Historic Pres., 841 F.2d at 484.

NECR claims that the Decision rejected RCNLD and that doing so constituted material error. (NECR Pet. for Recons. 3, 8, 10-11.) This argument mischaracterizes the Decision, which did not reject any RCNLD proposal, as neither NECR nor PAS proposed using RCNLD in the first place. Indeed, the Decision states that, "[i]f NECR had presented a calculation using the RCNLD methodology, such a proposal might have merited consideration, as the agency has accepted RCNLD valuations in previous cases." Decision, slip op. at 13 n.18. NECR may not reasonably argue that, even though neither party proposed RCNLD—indeed, NECR even asserted that RCNLD cannot be appropriately applied here—the Board should have created and adopted its own RCNLD valuation, either by using evidence in the record or by requiring the parties to submit supplemental evidence. (See NECR Pet. for Recons. 3-5, 8, 10-11; NECR Reply to Motion to Strike 5.) This was an adversarial proceeding, and this was an issue on which NECR sought a Board order and therefore bore the burden.[13] The Board does not agree that it should have ignored NECR's burden and second-guessed NECR by modifying its case in a way that NECR itself opposed. After making the tactical choice to oppose the use of RCNLD until reconsideration, NECR may not now claim error based on the Board's use of a methodology other than RCNLD.

[13] See 5 U.S.C. § 556(d) (under the Administrative Procedure Act, the proponent of a rule or order has the burden of proof); New England Cent. R.R.—Trackage Rights Order—Pan Am. S. LLC, FD 35842, slip op. at 5 (STB served Feb. 12, 2016) (directing each party to submit evidence and argument regarding its own proposed valuation methodology, after which the Board would "compare the methodologies put forth by each party [and] evaluate the parties' respective calculations") (emphasis added). Contrary to NECR's argument (NECR Reply to Motion to Strike 5), the statutory burden of proof and the Board's waiver practice described above are not limited to adjudications; both apply equally in quasi-legislative proceedings, where the same considerations regarding efficiency and timeliness are present. See 5 U.S.C. § 556(d) (referring to "the proponent of a rule or order") (emphasis added); Simplified Standards, EP 646 (Sub-No. 1), slip op. at 12-13 (applying the Board's waiver practice in a rulemaking proceeding).

B. NECR's Response to PAS's Capitalized Earnings (CE) Proposal

The Decision adopted PAS's CE calculation as the interest rental methodology for this proceeding. Decision, slip op. at 15-18. On reconsideration, NECR submits a variety of new arguments against PAS's CE proposal, including, for example, the general critiques that (1) CE "can only be used by the Board lawfully to the extent that the market value determined might reasonably approximate replacement cost," and (2) "the revenue inputs to the CE method had to be understated" because the previous trackage rights fee no longer compensated NECR adequately. (See, e.g., NECR Pet. for Recons. 2-3, 9-12.) It also makes new arguments about the CE calculation and rationale adopted by the Board, which were fully set out in PAS's evidence, including that (3) the "rate escalator" adopted in the Decision was "unreasonable because it assumed no growth or change in the future, despite the fact traffic is growing on the Line," and (4) the interest rental component would need to change if the weighted average cost of capital changes. (NECR Pet. for Recons. 11 & V.S. Carey 9-10.) NECR even includes a lengthy statement from a new expert witness—precisely the type of material a party would typically submit at the beginning of its case on the merits. (See id., V.S. Carey 2-3, 5-14.) All of these arguments and evidence (with one exception discussed below) are waived because they could and should have been submitted in response to PAS's merits presentation, which included a CE calculation with the features NECR now criticizes. (See PAS Reply 31-32 & V.S. Baranowski 33-41, July 19, 2016.)

NECR makes the incredible suggestion that it could not have known the Board might use CE or how CE would be applied, and therefore NECR could not have presented its reconsideration arguments and expert evidence regarding CE earlier in the proceeding. (See NECR Reply to Motion to Strike 14-15.) This claim is impossible to reconcile with even a cursory examination of the record. NECR argued as early as its Methodology Motion, filed in July 2015, that the Board should not apply CE—reflecting an obvious awareness that, unless the Board agreed with NECR's arguments, the Board might in fact apply CE. (See Methodology Motion 2-4, 6-13 ("NECR is filing this Motion to request that the Board find that the CE method is not an appropriate valuation method in this proceeding . . . .").) NECR made similar arguments in its merits pleadings. (See, e.g., NECR Opening 11 (claiming that CE is not available in this proceeding).) Moreover, PAS presented evidence and arguments proposing that the Board should apply CE and explaining, in great detail, how the Board should calculate it here. (See PAS Reply 31-32 & V.S. Baranowski 33-41, July 19, 2016.) NECR responded to these arguments at length in its rebuttal. (See NECR Rebuttal 42-47 (arguing that CE is not available and contesting the specifics of PAS's calculation).) NECR's claim that it could not have anticipated a possible application of CE is fundamentally implausible.

C. Competition and Revenue Adequacy

In its petition for reconsideration, NECR also argues that "the Board failed . . . to consider whether the trackage rights rates it imposed would permit NECR to earn adequate revenues, and it prescribed rates for PAS that would manifestly foreclose that opportunity." (NECR Pet. for Recons. 6.) However, as noted, the Decision adopted a trackage rights fee based on PAS's CE calculations, and NECR could have argued during the merits phase that a fee based

on those calculations would not permit NECR to earn adequate revenues. For example, there is no reason why NECR could not have presented the argument that CE does not sufficiently protect its revenue adequacy[14] at the merits phase as part of the debate over interest rental methodologies generally. NECR opposed the same CE calculation then that it opposes now, and it had every opportunity to present this revenue adequacy argument in response to PAS. See, e.g., NECR Rebuttal 42-47; Cost of Capital II, slip op. at 2 ("This argument is waived, because [petitioner] could have introduced it earlier but failed to do so" until reconsideration).

NECR attempts to justify its failure to raise these arguments during the merits phase by claiming that it could not have anticipated the Decision's reasoning because the Decision omitted any reliance on the concepts of revenue adequacy and competitive parity in determining the trackage rights fee. (NECR Reply to Motion to Strike 5-6, 18-19.) But the Decision did rely on revenue adequacy and competitive parity in determining the trackage rights fee. For example, the Decision rejected PAS's argument that the trackage rights fee should be frozen in perpetuity, because doing so would not be consistent with revenue adequacy or competitive parity, among other reasons. See Decision, slip op. at 7-8. Rather, the Decision concluded that applying SSW Compensation is necessary here in order to ensure revenue adequacy and competitive parity, which are goals embodied in the rail transportation policy of 49 U.S.C. § 10101. See id. Even though NECR disagrees with the Decision regarding what constitutes a proper application of SSW Compensation (and now attempts to submit new arguments and evidence addressing that question), NECR's disagreement does not mean the Board failed to consider the issues. See, e.g., Minisink Residents for Envtl. Pres. & Safety v. FERC, 762 F.3d 97, 112 (D.C. Cir. 2014). The Board "simply arrived at a result [NECR] did not like." See AEP Tex. N. Co. v. STB, 609 F.3d 432, 439 (D.C. Cir. 2010).

In a variation on its new revenue adequacy argument, NECR contends that "it is generally assumed that railroads must earn rates at least falling" into a specific range of revenue-to-variable-cost (R/VC) ratios. (See NECR Pet. for Recons. 11-12 & V.S. Carey 11-13.) NECR could have made such a claim regarding an R/VC range in its opening evidence, or at the latest, in its response to PAS on rebuttal. NECR was aware of the trackage rights fee that PAS proposed—which was lower than the fee ultimately set by the Board—and could have compared that fee to the R/VC ratios it presents now. See PAS Reply 3 n.9, July 19, 2016; Decision, slip op. at 10. Accordingly, this version of NECR's argument is also waived.

The same is true of NECR's new verified statements, and counsel's arguments based on these statements, regarding competition. (See NECR Pet. for Recons., V.S. Foley 1-2 (making claims as to the "percentage of NECR traffic on the Line [that] is subject to competition from PAS"), V.S. Carey 11 (claiming "that PAS has received an unfair competitive advantage").) Because the merits pleadings contained competition arguments and evidence that these new verified statements could have supported or opposed, NECR should have presented them at that time. (See NECR Opening, V.S. Ebbrecht 3 (claiming that "the competitive environment that was intended to be created has been eliminated" and that "NECR cannot compete against PAS's

[14] (See NECR Pet. for Reconsideration 1-2, 6-8 & V.S. Carey 2, 13-14; see also PAS Motion to Strike 12-13.)

rates"); PAS Reply, V.S. Bostwick 3-4, July 19, 2016 (claiming that "the presence of two competitive rail carriers has resulted in reduced rates for rail-dependent shippers and has preserved a cost-effective, efficient alternative for those rail shippers that can use other modes").) Accordingly, by failing to introduce this evidence during the merits phase, NECR waived it. See Simplified Standards, EP 646 (Sub-No. 1), slip op. at 12-13.

D. Insurance Terms and Reopening Period

NECR asserts that the Board "failed to recognize the economic impact" of retaining the original TO's insurance and indemnification provisions. (NECR Pet. for Recons. 12.) Among other arguments in support of this claim, NECR speculates that "a significant incident on the Line involving hazardous materials" could lead to damages that exceed PAS's assets and insurance coverage, and "NECR will be left to cover this exposure under the current TO." (See id.) NECR waited until reconsideration to raise these arguments for the first time, but could have raised them on opening in support of its proposed changes to the insurance and indemnification terms, or in response to PAS's reply arguments. (See NECR Opening 17 & Ex. C at 3, 7-8; NECR Rebuttal 54-56.) As these reconsideration arguments amount to a new affirmative case for NECR's proposed terms, they are waived. See Tex. Mun. Power Agency, 7 S.T.B. at 804.

Finally, NECR argues that "the 20 year term set forth in the TO has no relationship to market reality" and "could be significantly detrimental to the railroads and customers on the Line in the event NECR is unable to earn adequate returns." (NECR Pet. for Recons. 13 & V.S. Carey 19-20.) Again, NECR has forfeited its reconsideration arguments and evidence on this subject because it could have submitted them earlier in the proceeding, in response to PAS's reply arguments. See PAS Reply 37, July 19, 2016; NECR Rebuttal 51; Tex. Mun. Power Agency, 7 S.T.B. at 804.[15]

III. NECR Arguments That Are Not Waived

As discussed above, NECR waived most of its reconsideration evidence and arguments because it could and should have presented these materials during the merits phase. However, NECR raises three arguments in support of its claim of material error that were not waived because they invoke claims that were raised prior to reconsideration. First, NECR in a footnote renews on reconsideration the argument that CE cannot be applied here because "the key factors required for the analysis are not easily developed or are unreliable." (See NECR Pet. for Recons. 9-10 n.10.) Second, NECR renews on reconsideration the contention that the new trackage rights fee should be imposed retroactively. (See id. at 12.) Finally, NECR argues again that, by confirming that haulage is permitted under the TO, the Decision "allow[s] PAS to extend

[15] The Board declines to address NECR's single-sentence observation that "the escalator set forth in the TO is unduly burdensome, complex, and ambiguous, such that it will be difficult for NECR and PAS to implement." (NECR Pet. for Recons. 13.) Had NECR provided an explanation for this claim, the Board would have considered that explanation and addressed any undue burden, complexity, or ambiguity if necessary. However, NECR does not elaborate.

its preferential rates to any connecting carrier" and "extend[s] PAS' advantage to connecting railroads." (See id. at 13.)

In each case, NECR merely repeats the conclusions of its prior arguments; it does not even mention the Decision's reasoning for rejecting NECR's prior arguments, much less try to demonstrate material error. See Decision, slip op. at 15-18, 22, 28. For this reason, the Board finds that NECR has failed to establish material error.

IV. Conclusion

NECR has not shown material error in the Decision. Because most of NECR's reconsideration evidence and arguments are waived, and the few remaining arguments lack merit, the Board will deny NECR's petition for reconsideration.

It is ordered:

1. The petition for reconsideration is denied.

2. The motion to strike is denied as moot.

3. This decision is effective on its date of service.

By the Board, Board Members Begeman and Miller.